Supreme Court
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-125

JOSEPH A. LANGONE, III,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Joseph A. Langone, III, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on this case June 25, 1971.

Opinion Below

The opinion of the Court of Appeals for the First Circuit filed June 25, 1971, printed in the Appendix, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 25, 1971 (App. 12). The jurisdiction of this Court rests on 28 U.S.C. 1254.

Statute Involved

Title 18 U.S.C. §111 of the Criminal Code provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both . . ."

Question Presented

Whether a defendant must have knowledge that an official "is engaged in or on account of performance of his official duties" before he can be convicted of a violation of Title 18 U.S.C. §111.

Statement of the Case

The defendant was convicted in the United States District Court for the District of Massachusetts of forcibly assaulting a federal agent of the Narcotics Bureau while in the course of his official business.

The agent pulled up in an unmarked car in front of the defendant's funeral home and the defendant objected to the car's placement. (App. 13). There was evidence that the defendant thought the agent was going to lunch. (App. 14).

The defendant shoved the agent and the incident was over. (App. 14).

The defendant requested that the Court instruct the jury that the defendant must know that the one allegedly assaulted was a federal officer who was engaged in the course of his official business at the time. The requested instruction was refused. (App. 14) The defendant appealed to the Court of Appeals for the First Circuit and the conviction was affirmed. (App. 15) That Court ruled that knowledge is not required in proving a violation of 18 U.S.C. §111. The defendants then filed this petition for writ of certiorari.

Reasons Why The Writ Should Be Granted

Certiorari should be granted to resolve the conflict in opinions between several of the Circuit Courts and the Supreme Court over the requirement of scienter in 18 U.S.C.A. §111; and to resolve a conflict, at least in principle, between these circuits and the 6th Circuit.

That statute at issue states that "whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties . . ." shall be guilty of a crime.

The purpose of this statute has been quite clearly stated in *United States* v. *Wallace*, 368 F.2d 537 (4th Cir. 1966) where the Court said at 548-539: ". . . §§111 and 1114 were enacted to assure that those who unlawfully attacked or interfered with federal officials engaged in their official duties were triable in a federal court . . ." See also the opinion of the Court of Appeals below. (App. 15)

It has been recognized by various circuit courts that the statute takes a common law crime that is primarily within the jurisdiction of the state and makes it a federal crime

by virtue of the status of the victim. In an early case in the District Court of Virginia, *United States* v. *Taylor*, 57 F.391, the Court said:

> "To assault an officer of the United States while happening to be engaged in performing some duty enjoined upon him by federal statute is only a common-law offense; and it becomes a statutory offense only when the assailant knows that the assailed is an officer of the United States, and makes the assault for the purpose of obstructing the officer in the discharge of duty imposed by laws of the United States."

In the case at bar the First Circuit Court of Appeals chose to follow a series of cases in the Second, Fourth, Fifth, Eighth and Ninth Circuits and particularly the case of *Goodwin* v. *United States*, 440 F.2d 1152 (3rd Cir. 1970) which espoused the theory that eliminates the requirement that the defendant know the person assailed was a federal officer in the course of official business as a material element of §111.

The elimination of this time-honored requirement goes far beyond the legislative purpose of the statute and usurps what would otherwise be exclusively within the jurisdiction of the state. This Court held in *Pettibone* v. *United States*, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed 419 (1892) involving a statute which for all material purposes was no different than §111 (See *Pipes* v. *United States*, 399 F.2d 471 at 473) "In cases of that sort it is the official character that creates the offences and the *scienter* is necessary . . . (205)

In this case, an agent of the Narcotics Bureau was parking his unmarked car in a place which the defendant found objectionable for the purpose, as the defendant believed, of going to lunch, when an argument developed which led

ultimately to the defendant shoving the agent violently against his car.

The defendant requested an instruction that he had to know that the agent was an official on official business in order to have committed the statutory offense charged. The rejection of this instruction by the trial court was affirmed by the First Circuit Court of Appeals notwithstanding the authority of this Court.

The elimination of scienter eliminates the wilful criminality of the offense charged in §111. This result was recognized and rejected by *Pettibone, supra,* wherein the Supreme Court said at 207:

> "It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise.
>
> It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability."

The direct holding of the Supreme Court in *Pettibone, supra,* was applied and followed in cases involving §111 of Title 18 in *Hargett* v. *United States,* 183 F.2d 859 (5th Cir. 1950). This requirement of knowledge was consistently followed in the Fifth Circuit where the greatest frequency of these cases are found. *Carter* v. *United States,* 231 F.2d

232 (5th Cir. 1966). *Hall* v. *United States*, 235 F.2d 248 (5th Cir., 1956)

The Fifth Circuit began the reversal of this rule in *Bennett* v. *United States*, 285 F.2d 567 (5th Cir. 1960) which was solely concerned with the sufficiency of an indictment which followed the statutory language of §111 but did not include an allegation of knowledge.

Since *Bennett*, *supra*, is the case that began the domino fall of the circuits on the requirement of scienter, it bears closer examination. The Court of Appeals in *Bennett*, *supra*, did not cite any of the previous cases in the Fifth Circuit which followed the rule of scienter as required by *Pettibone*, *supra*. The Court ignored *Hargett*, *supra*, *Carter*, *supra*, and *Hall*, *supra* and cited *McNabb* v. *United States*, 123 F.2d 848 (6th Cir. 1941) which already had been distinguished by the Fifth Circuit Court of Appeals in *Hargett*, *supra*, as a homicide not requiring scienter.

In *Pipes* v. *United States*, 399 F.2d 471 (1968) the Fifth Circuit continued to uphold their *Bennett* decision on scienter but a vigorous dissent was entered by Judge Godbold on the rule of no scienter was required. Judge Godbold reviewed the past cases in the Fifth Circuit including *Hargett* v. *United States*, 183 F.2d 859 of which he said at 473:

> "... the government squarely met the issue of knowledge by the defendants that the victims of an assault were federal officers and insisted knowledge was not necessary to conviet. ... The court ... followed the decision of the Supreme Court in Pettibone ... which held scienter necessary in a prosecution for obstruction of officers of the United States, brought under what was then Rev. Stat. §5399."

Bennett, supra, with its less than thorough analysis of the issue thereafter became the precedent which has established the theory which eliminated scienter in the First, Second, Third, Fourth, Fifth, Eighth and Ninth Circuits. See *United States* v. *Wallace*, supra and *United States* v. *Lombardozzi*, 335 F.2d 414 (2d Cir. 1964).

In his dissent in *Pipes, supra,* Judge Godbold recognized the weakness of the theory when he stated at 477:

> "The Second Circuit already has pointed out that *Lombardozzi* — which embraced the *Bennett* dictum — is too broad and probably will be modified or limited in arrest cases. United States v. Heliczer, 373 F.2d 241, 248 (2d Cir. 1967) . . . In the past the requirement of knowledge has been tempered by the cases holding that knowledge need only be proved and not specifically alleged and that the proof can consist of such objective facts as would give knowledge. An unlimited rule of no knowledge would have to be restricted sooner or later in circumstances involving rights of citizens who are involved with persons they neither know nor have reason to know are federal officers."

This rule has already created problems with specific fact situations which have caused several of the circuits to suggest that there are exceptions where the violation of the statute would indeed require the proof of knowledge.

In *Burke* v. *United States*, 400 F.2d 866 (5th Cir. 1968) at 868 the Court suggested that it may be necessary to charge the jury on the element of knowledge where the proscribed act was not an assault but involved only one who

> " 'forcibly resists * * * opposes, impedes, intimidates or interfered with any person * * * while engaged in or on account of the performance of his official duties'.

> Since it is clear that there must be a wilful and intentional forcible course of conduct proven in order to satisfy the requirements of the statute, it may well be that as to some of the other forbidden acts it would be necessary for the court to charge the jury in terms that would make it essential to show that the accused person knew of the identity of the government official as such in order for him to be guilty of wilfully violating the statute."

In *United States* v. *Ulan*, 421 F.2d 787 (2d Cir. 1970) the Court reviewed its holding in *Lombardozzi, supra*, affirmed it but recognized exceptions to it citing from its earlier dictum in *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir. 1967) that under certain circumstances especially as they involve the right of self-defense.

It is respectfully submitted that the necessity of creating exceptions to the rule as it relates to possible ways that the statute may be violated bears witness to the defects in the theory.

In *Morissette* v. *United States*, 342 U.S. 246 this Court refused to recognize different standards of proof of the violation of a single statute which proscribed several different courses of conduct. No greater right should be afforded the government for the several different courses of conduct which are proscribed by §111 in issue here.

Not only does the First Circuit by ignoring the holding of this Court in *Pettibone, supra*, create a conflict of opinions which should be resolved by the Court here, but in ruling as it did it creates a conflict with the Sixth Circuit.

In *United States* v. *Rybicki*, 403 F.2d 599 (6th Cir. 1968) the defendant was convicted of obstructing two Internal Revenue agents in violation of 26 USCA §7212.

The statute involved in the *Rybicki* case provides:

> "Whoever corruptly or by force or threats of force . . . endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title or in any way . . ., obstructs or impedes . . . the due administration of this title, shall, upon conviction thereof, be find not more than $5,000 or imprisoned not more than 3 years, or both . . ."

The defendant Rybicki had been assessed a delinquent tax which he failed to pay. The Internal Revenue agents came to his house and after failing to arouse anyone placed seizure papers on the two vehicles in his yard and started backing one out of the yard. The defendant appeared in pajamas with a double-barrelled shotgun and told them to get off his property. The defendant requested a similar instruction to that requested by this defendant that he had to know they were officers performing their duty. The government argued that no such knowledge is required and cited *McNabb, supra, Wallace, supra,* and *Lombardozzi, supra.*

In regard to that argument, the Sixth Circuit Court of Appeals said at 601-602:

> "These authorities may be distinguished from the case at bar by the fact that the offenses there involved would have been crimes regardless of the person against whom they were committed . . . We are of the opinion that Pettibone v. United States, supra, and Morrissette v. United States, 342 U.S. 246, 263, 273, 276, 72 S. Ct. 240, 96 L. Ed. 288 (1952) command a holding by us that an element of the crime charged to Rybicki was knowledge that the Internal Revenue agents were such and were engaged in performing their duty. We so hold."

This holding by the Sixth Circuit on a statute similar to §111 in all essentials is in direct conflict with the holding of First Circuit Court of Appeals in this case. On this basis alone there is a question of importance worthy of consideration by this Court.

Numerous statutes of similar ilk without any statement of knowledge have been held to require knowledge. Title 18 USCA §1503 on intimidating an officer is one such statute and knowledge is required in *Broadbent* v. *United States*, 149 F.2d 580 (10th Cir. 1945). 18 USCA §201 on offering a bribe to a federal officer, the requirement of knowledge was upheld in *Chiaravalloti* v. *United States*, 60 F.2d 192 (7th Cir. 1932), and in *Cohen* v. *United States*, 294 Fed. 488 (6th Cir. 1932)

In view of the unresolved conflicts on the question of scienter the defendant respectfully submits that this court grant certiorari to this case.

There exists a conflict of opinions on this essential question of scienter but further there is an important policy issue which enters into the consideration of this case. Without the distinguishing factor of scienter, §111 of the criminal code is no different from any common-law assault and battery. If this statute remains as it is presently construed by several of the circuits as previously discussed the federal courts will be absorbing petty crimes for prosecution under §111 and the numerous other statutes of like purpose that are of little consequence to the continuation of the federal government's operation.

As it has been publicly stated by the present Chief Justice of the Supreme Court, the federal courts are to refrain from entertaining prosecution of matters normally reserved to the jurisdiction of the states and which should remain within that jurisdiction. It is submitted that this case would be an appropriate vehicle to begin the redefini-

tion of the boundaries of jurisdiction between the state and federal courts in our Federal system of government.

Conclusion

In view of the conflicts between the Circuits on the necessity for scienter in convictions under §111 and the unnecessary intrusion into crimes of local concern, the defendant respectfully requests that this Court grant certiorari to review this case.

Respectfully submitted,

WALTER J. HURLEY
Attorney for the Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1035

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOSEPH A. LANGONE, III,
DEFENDANT, APPELLANT

JUDGMENT
Entered June 25, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: Messrs. Hurley and Higgins.]

United States Court of Appeals
For the First Circuit

No. 71-1035

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSEPH A. LANGONE, III,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Walter J. Hurley for appellant.
George V. Higgins, Assistant United States Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, was on brief, for appellee.

June 25, 1971.

ALDRICH, *Chief Judge*. This is an appeal from a conviction under 18 U.S.C. § 111, for assaulting and impeding a federal officer (a narcotics agent) in the performance of his official duties.* The government showed that the agent was on his way to meet an informer when he parked his government owned, but unmarked automobile in front of defendant's funeral home; that defendant emerged from the home and objected to the vehicle's placement, and that

* "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both. . . ." 18 U.S.C. § 111.

in the course of remonstrating defendant used threatening language and gestures and gave the agent a violent shove against the car. There was ample evidence as to all of the requirements specifically expressed in the statute, and the court properly instructed the jury thereon. Defendant requested that the court further charge that it was the government's obligation to prove that he knew the agent to be a federal officer, and, in addition, that he knew the agent was engaged in official duties. The court gave the first request, but refused the second. This denial is the sole issue on this appeal. It is squarely presented because the defendant's testimony was clear — although contradicted — that defendant thought the agent was merely on his way to lunch, which might not fall within the performance of official duties. *Cf. Wilson* v. *United States,* 1 Cir., 1969, 412 F.2d 694, 696.

The government brief takes the extraordinary position that because its evidence as to defendant's knowledge was so strong, and the defendant's so unpersuasive, there was no basis for the requested instruction even if the government was obliged to prove the defendant's knowledge as to all of the conditions of the statute. If proof of knowledge is part of the government's case, the strength of the government's evidence, or the weakness of the defendant's, is immaterial. The defendant need not affirmatively deny an allegation at all, for there is always a jury question as to every issue, except those expressly conceded, on which the government has the burden. *DeCecco* v. *United States,* 1 Cir., 1964, 338 F.2d 797; *Alessio* v. *United States,* 1 Cir., 1971, 439 F.2d 803. The government's brief is so concerned with this mistaken approach and with reciting, in detail, evidence irrelevant even from that standpoint, that it never squarely reaches the question raised by defendant's requested instruction.

In *Portnoy* v. *United States,* 1 Cir., 1963, 316 F.2d 486,

cert. denied, 375 U.S. 815, the issue of knowledge arose in terms of the content of a section 111 indictment. We held the indictment sufficient because it in fact adequately, although indirectly, charged defendant's knowledge. Although the statute does not in terms require knowledge, we recognized that some courts imposed that obligation, but found it unnecessary to express our own view.

Since that date the trend has been away from such a requirement. The court in *United States* v. *Goodwin*, 3 Cir., 4/5/71, F.2d , in holding that the government need not prove that the defendant had knowledge of his victim's identity, cites, in accord, recent decisions from the Second, Fourth, Fifth, Eighth and Ninth Circuits. *See* —— F.2d —— at .——. We align ourselves with the view of these circuits, particularly for the reasons expressed in *Goodwin* and *United States* v. *Lombardozzi*, 2 Cir., 1964, 335 F.2d 414, *cert. denied*, 379 U.S. 914. The purpose of the statute is to provide federal officers the protection of the federal courts when they are performing their duties. Burdening the government with an obligation to prove knowledge could seriously impede this purpose.

Finally, defendant argues that knowledge should be required when he was not the object of the agent's activities. If defendant's position were that he was, in good faith, engaged in lawful defense of himself or his property, there might be merit in such a contention. Absent such a claim, we see no relevance in his relationship to the officer. *See Burke* v. *United States*, 5 Cir., 1968, 400 F.2d 866, *cert. denied*, 395 U.S. 919; *United States* v. *Ulan*, 2 Cir., 1970, 421 F.2d 787. The court did not err in refusing to instruct the jury that it must find that defendant knew the agent was officially engaged. Indeed, in requiring knowledge of the agent's identity it was more cautious than need be.

Affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of having assaulted and impeded a federal officer (a narcotics agent) in the performance of his official duties, in violation of 18 U.S.C. 111. The court of appeals affirmed (Pet. 13-15).

At trial, petitioner requested instructions that it was necessary for the government to show that he knew the agent to be a federal officer and that the officer was then engaged in official duties. The trial

judge granted the first instruction but refused the second.

Petitioner, largely addressing his argument to the issue whether knowledge that the officer is a federal officer is required, contends that there is a conflict in decisions between courts of appeals that merits review. However, petitioner was given the benefit of an instruction on this issue by the trial judge. It was not necessary to show further that he knew the officer was engaged in official duties. Moreover, as the petitioner himself and the opinion below show, no court of appeals presently holds that knowledge of the federal status of the officer is an element of the crime.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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[1] Though petitioner asserts that the decision below conflicts with a decision of the Sixth Circuit Court of Appeals concerning a statute "similar to § 111 in all essentials" (Pet. 10), that court recently held that scienter is not an essential element under 18 U.S.C. 111. *United States* v. *Kiraly*, No. 21047, decided July 14, 1971.

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